later be used in malpractice or other actions against the individual whose performance is being reviewed, many physicians will not serve as peer reviewers at all – or will dilute their comments in a manner that detracts from the usefulness of the process.

Third, physicians fear that disclosure of peer review materials will lead to a loss of referrals or to strained relations with colleagues. See Owens, *Peer Review: Is Testifying Worth the Hassle?*, Med. Econ., Aug. 20, 1984, at 168 (noting that 21% of physicians had lost referrals or had antagonized colleagues because of their participation in peer review procedures). The loss of referrals is an especially serious concern as an increasing number of physicians practice in referral specialties that leave them dependent on the goodwill of their colleagues. See P. Scibetta, Note, *Restructuring Hospital-Physician Relations: Patient Care Quality Depends on the Health of Hospital Peer Review*, 51 U. Pitt. L. Rev. 1025, 1034-35 (1990). Put simply, the threat of disclosure undermines the collegiality upon which effective peer review, in the interest of patients, depends.

II. FORTY-NINE STATE LEGISLATURES AND THE UNITED STATES CONGRESS HAVE RECOGNIZED THE COMPELLING PUBLIC INTEREST IN EFFECTIVE MEDICAL PEER REVIEW AND HAVE ENACTED STATUTES PROVIDING CONFIDENTIALITY AND PRIVILEGE PROTECTIONS.

It takes no great insight to see that if medical peer review proceedings are not protected from discovery, they will not be as effective. Not surprisingly, therefore, by the year 2000, forty-nine states had enacted statutes to protect medical peer review records and deliberations from discovery. See IOM,

supra, at 119 & n.* (New Jersey was the exception.).[4] Although these statutes vary in the degree of protection they afford to peer review proceedings, they each seek to promote the salutory purposes of medical peer review proceedings by protecting such proceedings from discovery.

The Arizona statute is illustrative: "The governing body of each licensed hospital . . . shall require that physicians . . . review the professional practices within the hospital or center *for the purpose of reducing morbidity or mortality and for the improvement of all care of patients provided in the institution.*" Ariz. Rev. Stat. § 36-445 (emphasis added). "All proceedings, records and materials prepared in connection with the reviews . . . are confidential and are not subject to discovery. . . ." *Id.* § 36-445.01. See also *id.* § 36-2403. The Joint Commission on the Accreditation of Healthcare Organizations ("JCAHO"), the leading hospital accreditation body in the United States, has also recognized that physicians are in the best position to evaluate the quality of medical care provided by other physicians. JCAHO requires physicians to participate in efforts to measure outcomes and processes, and to evaluate "individuals with clinical privileges whose performance is questioned as a result of the measurement and assessment activities." JCAHO, *2000 Hospital Accreditation Standards* 303 (2000). The policy underlying the JCAHO standards is "to improve the quality of care provided to the public." *Id.* at ii.

State laws protecting peer review are, however, of little value if federal courts do not recognize a federal privilege. A physician contemplating participation on a peer review committee or determining what position to take in the review of a specific incident cannot know whether litigation in which the results of the peer review proceeding will be sought will

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[4] However, the New Jersey courts have recognized a common law "self-critical analysis" privilege for peer review materials. *See, e.g., McClain* v. *College Hosp.*, 492 A.2d 991, 998 (N.J. 1985).

take place in state court or in federal court. The possibility that it will occur in a federal court that refuses to recognize the privilege is likely to affect the physician's judgment.

Principles of comity require that federal courts recognize the privileges established by state statute "where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States* v. *King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976). This Court has previously deferred to state trends in deciding important privilege issues. Compare *Trammel* v. *United States*, 445 U.S. 40, 49-53 (1980) (narrowing privilege), with *Jaffee* v. *Redmonds*, 518 U.S. 1, 13 (1996) (creating new privilege). *Amici* urge the Court to recognize the impressive consensus among the states that a compelling public interest in effective medical peer review procedures requires confidentiality and privilege protections.

Moreover, Congress' enactment of the Patient Safety and Quality Improvement Act of 2005 ("the Act") demonstrates Congressional recognition of the importance of confidentiality and privilege protections for medical peer review proceedings. The Act creates a new system of voluntary medical error reporting that encourages health care providers to report medical errors to a centralized database where researchers will analyze the information and provide recommendations for improving patient safety. The Act establishes "Patient Safety Organizations" as the means of conducting these "activities that are to improve patient safety and the quality of health care delivery." 42 U.S.C. § 299b-24(b)(1)(A). The efforts of Patient Safety Organizations are complementary to those of medical peer review committees: Patient Safety Organizations will do on a national and system-wide level what medical peer review committees do on a local and individual level.

Significantly, the Act provides privilege and confidentiality protections for all "patient safety work product" used to conduct patient safety activities. *Id.* § 299b-21(7)(A). Patient safety work product is broadly defined to include "any data,

reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements" that are "assembled or developed" by a provider or a patient safety organization for "the conduct of patient safety activities." *Id.* By including broad confidentiality and privilege protections in the Act, Congress acknowledged that medical error reporting – and medical peer review activities – are compromised when there is a threat of disclosure in discovery proceedings and when medical peer reviewers are subject to potential liability. See S. Rep. No. 108-196, at 4 (2003) ("The purpose of this legislation is to encourage a 'culture of safety' and quality in the U.S. health care system by providing for broad confidentiality and legal protections of information collected and reported voluntarily for the purposes of improving the quality of medical care and patient safety.").

In addition, the Act addresses the need for confidentiality and privilege protections for state mandated and institutionally mandated medical peer review proceedings by providing that the Act does not "limit the application of other Federal, State, or local laws that provide greater privilege or confidentiality protections than the privilege and confidentiality protections provided for in this section." 42 U.S.C. § 299b-22(g)(1). This language ensures that confidentiality and privilege protections provided by state statutes are not limited by the Act, a provision that further demonstrates Congress' recognition that these protections are essential to medical peer review activities.

CONCLUSION

There is a compelling federal interest in respecting state laws that protect medical peer review proceedings from discovery in litigation. These laws safeguard the efficacy of the most effective mechanism to address medical errors. The decision below undermines this important federal interest by making the confidentiality of peer review records depend on whether they are sought in federal or in state court – something that physicians who are asked to conduct peer review proceedings cannot know at the time that they decide whether to participate or at the time that they determine what to include in the report. For the reasons set forth above, this Court should grant the petition for certiorari to consider whether to recognize and delimit a federal privilege for medical peer review proceedings protected by state law.

Respectfully submitted,

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August 29, 2005

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APPENDIX

H-375.997 VOLUNTARY MEDICAL PEER REVIEW

Our AMA advocates the following principles for voluntary medical peer review: (1) Medical peer review is an organized effort to evaluate and analyze medical care services delivered to patients and to assure the quality and appropriateness of these services. Peer review should exist to maintain and improve the quality of medical care.

(2) Medical peer review should be a local process.

(3) Physicians should be ultimately responsible for all peer review of medical care.

(4) Physicians involved in peer review should be representatives of the medical community; participation should be structured to maximize the involvement of the medical community. Any peer review process should provide for consideration of the views of individual physicians or groups of physicians or institutions under review..

(5) Peer review evaluations should be based on appropriateness, medical necessity and efficiency of services to assure quality medical care.

(6) Any system of medical peer review should have established procedures.

(7) Peer review of medical practice and the patterns of medical practice of individual physicians, groups of physicians, and physicians within institutions should be an ongoing process of assessment and evaluation.

(8) Peer review should be an educational process for physicians to assure quality medical services.

(9) Any peer review process should protect the confidentiality of medical information obtained and used in conducting peer review. (CMS Rep. A, I-81; Reaffirmed: CLRPD Rep. F, I-91; Reaffirmation I-98; Reaffirmed: BOT Rep. 8, I-01)

(4)

No. 05-139

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARICOPA COUNTY, a public entity, and
MARICOPA COUNTY CORRECTIONAL HEALTH SERVICES,
a division of Maricopa County,
Petitioners,

v.

CAROL ANN AGSTER, personal representative of the
Estate of Charles J. Agster, III, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 05-139

PETITIONERS' REPLY

Petitioners respectfully submit this reply brief in support of the petition for certiorari.* The amicus curiae briefs of the American Medical Association and various California counties underscore the importance of this Court's review of

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* The petition for certiorari was timely filed on July 25, 2005, seeking review of the Ninth Circuit's April 28, 2005 decision. On August 29, 2005—the same day as respondents filed their brief in opposition and the American Medical Association and the County of Los Angeles submitted amicus curiae briefs in support—the Ninth Circuit, *sua sponte*, withdrew its April 28, 2005 opinion and substituted a new opinion in its place. The judgment affirming the district court's order was unchanged, and the court of appeals' analysis of the medical peer review privilege, the subject of the question presented in this Court, remained the same. The difference in the opinion is that the Ninth Circuit refined its analysis of the appealability of the district court's order under 28 U.S.C. § 1291, *see* Pet. 4-5 and Pet. App. 3a-4a, although the court's bottom line even on this matter did not change.

After consulting with the Office of the Clerk of the Supreme Court, petitioners determined that it is not necessary to file an entirely new petition for certiorari and that this reply brief is an appropriate mechanism for informing the Court of the change in the opinion below (the judgment remains the same); after all, although it exists here, even a final judgment is not required for a writ of certiorari to a federal court of appeals (as opposed to situations involving state-court decisions). *Compare* 28 U.S.C. § 1254(1) (certiorari may be granted to review a case in the federal court of appeals "before or after rendition of judgment or decree") *with* 28 U.S.C. § 1257(a) (certiorari to state courts limited to "[f]inal judgments or decrees"). The brief appendix at the end of this reply specifies the change in the Ninth Circuit's opinion.

the Ninth Circuit's decision. By contrast, respondents' suggestions do not adequately support denying the petition concerning the medical peer review privilege which has been recognized throughout the state courts.

1. Respondents' fundamental assertion, phrased a variety of ways, is that the question of a federal medical peer review privilege is insufficiently controverted to warrant this Court's review. This claim does not withstand scrutiny.

There are two conflicts that respondents cannot evade. The first is that federal law as stated by the Ninth Circuit here (and a number of other federal courts of appeals, though not all, *see* Pet. 7-8) is incongruent with the law of essentially every State. Medical peer reviews are privileged in state courts, but fully discoverable in many federal courts. As the amicus curiae brief submitted on behalf of California counties reflects, the result of this disparity will be effectively to eliminate the benefits of the state-law privilege in many of the numerous situations where a federal-law claim can be joined with a state-law tort claim.

Even apart from the importance of resolving this discrepancy so that rejection of the privilege in some federal courts does not vitiate its recognition in state courts, *cf. Jaffee v. Redmond*, 518 U.S. 1, 13 (1996) (explaining recognition of psychotherapist-patient privilege in part on ground that "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications"), this federal-state conflict supports review. The actions of the various States in recognizing a medical peer review privilege make it increasingly difficult under Federal Rule of Evidence 501 to maintain that "reason and experience" support the categorical denial of the privilege in federal-court cases involving at least one federal claim.

The other conflict is in the federal district courts—the sole federal forum for the resolution of almost all privilege (and other discovery) questions. At one point, respondents appear to deny the existence of *any* such division of authority, *see* Pet. 9, but ultimately settle upon the claim that decisions recognizing a medical peer review privilege "are considered anomalies and against the weight of federal authority," Pet. 14. This is simply incorrect. As petitioners have demonstrated, there is a deep and persistent division among the federal district courts. *Compare* Pet. 9 n.2 (citing cases recognizing a federal medical peer review privilege) *with id.* n.3 (citing cases ruling to the contrary).

Nor can it accurately be said—despite respondents' attempt—that the cases recognizing a privilege reflect some superannuated view. To be sure, the leading case on the matter, *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd mem.*, 479 F.2d 920 (D.C. Cir. 1973), was decided some thirty-five years ago. In respondents' curious view, because it thus preceded Congress's enactment of Federal Rule of Evidence 501 in 1975 (both dates having been previously noted, *see* Pet. 11, 14), *Bredice* cannot form the basis for decisions today. *See* Br. Opp. 2, 11, 15 (emphasizing that *Bredice* was decided before adoption of Fed. R. Evid. 501 and stating that this makes the case "outdated" and "inappropriat[e]" for the Fifth Circuit to rely upon it) (quoted material at 2). This is nonsense; such a decision date is entirely consistent with (and perhaps even supportive of) the analysis based on "reason and experience" that Rule 501 requires.

But, more fundamentally, respondents' analysis would be news to the federal district courts. As demonstrated in the petition, numerous cases in the federal courts look to *Bredice* as the leading case. They do this even where they rule to the contrary and reject a privilege. *See* Pet. 9 n.3 (citing cases and parenthetically noting discussion of *Bredice*). And they

certainly do it where they recognize the privilege. *See id.* n.2 (same). There is no shortage of either sort of case. Respondents further do not contest that the rule of *Bredice* constitutes the law of the D.C. Circuit, *see* Pet. 8.

Although respondents thus seek to minimize the importance of, or even to deny, the existence of important conflicts between federal and state law and within the lower federal courts, they claim throughout the response that to recognize a privilege here would *create* a conflict: with Congress.

The fact that Congress in particular circumstances (where the federal government itself has had some peculiarly important interest at stake) has adopted statutory privileges, *see* Br. Opp. 13 (citing Department of Defense, Veterans Affairs, Coast Guard, Social Security statutes), does not support denying a privilege here. Congress made clear, in replacing the proposed Federal Rule of Evidence 501 (which would have prescribed nine specific privileges) with its own version in 1975 (which still exists today), that it wanted the identification of privileges in federal civil litigation typically left to a common-law process. *See generally* Pet. 11.

The Health Care Quality Improvement Act of 1986 (HCQIA) did not reflect some rejection of this general rule whenever a medical peer review issue arises, as respondents seem to suggest. *See* Br. Opp. 7-11. At most, the HCQIA could be argued to support denial of a privilege in cases covered by the Act—but, as amicus AMA observes, the HCQIA does not apply to this action. *See* AMA Amicus Br. 6 n.3.

The most directly relevant precedent, therefore, is not *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), which both the Ninth Circuit and respondents here invoke in the context of discussing the HCQIA, but *Jaffee v. Redmond*, 518 U.S. 1 (1996). In *University of Pennsylvania*, it appears that no State recognized the sort of academic-criticism

privilege that was sought. By contrast, in both *Jaffee* (of which respondents are able to muster up only one citation despite its prominence in the petition) and this case, the law applicable in every state court recognized the privilege whose recognition was sought in the federal action. That alone—even leaving aside for a moment the support for the privilege in commentary on law to which respondents offer no response and the division in the lower federal courts—is a compelling basis for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[On August 29, 2005, the Ninth Circuit *sua sponte* withdrew its April 28, 2005 decision, set forth as Appendix A in the petition for certiorari, and replaced it with a new opinion, as described at p. 1 note * of the foregoing reply brief.]

[With one exception, the changes within the opinion are all in the "*Jurisdiction*" portion of the "ANALYSIS" section. *See* Pet. App. 3a-4a. (The exception is that the Ninth Circuit corrected the typographical error previously noted in the fourth line of the first full paragraph on Pet. App. 5a, such that "patient case [*sic*]" in that line should now simply read "patient care".) The first paragraph (on Pet. App. 3a) of the "*Jurisdiction*" portion is unchanged; in place of the second and only other paragraph in that portion (which appears at the top of Pet. App. 4a), the following three paragraphs now appear:]

Our circuit has not resolved the general question of "whether a discovery order disposing of an asserted claim of privilege could be independently appealed under the collateral order doctrine of *Cohen*[.]" *United States v. Fernandez*, 231 F.3d 1240, 1245 n. 4 (9th Cir. 2000). We need not do so here; it suffices to conclude that under the specific circumstances of this case, including the nature and importance of the privilege at issue, jurisdiction lies.

The issue of the production of the mortality review is conclusively resolved, and the statutory grant of the claimed privilege by Arizona and other states attests to its importance. The trickier question, as we recognized in a related context in *Bittaker v. Woodford*, 331 F.3d 715, 718 (9th Cir. 2003) (en banc), is whether the issue at stake will be effectively unreviewable after a final judgment. As we stated in *Bittaker*, the district court's order regarding the privilege is "reviewable on appeal from the final judgment, no matter

who wins below on the merits," and "at that time we will know much more about the practical effect of the order, if any." *Id.* at 717. Further, "if [plaintiffs are] unsuccessful in any of [their] claims, and no retrial is necessary, the order would become irrelevant for all practical purposes." *Id.* A similar result would also follow if, upon appeal after a final judgment, we assumed the impropriety of the discovery order but found the error harmless.

However, we conclude, as we did in *Bittaker*, that the decision is appealable now "because significant strategic decisions turn on its validity," and "review after final judgment may therefore come too late." *Id.* at 717-718. Once "the cat is already out of the bag," it may not be possible to get it back in. *See id.* (quoting *In re Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997)). Even if a new trial were ordered at which the material found to be privileged was not admissible, it might be impossible to undo the effects of the disclosure with regard to the information in plaintiffs' hands and its effect on their trial strategy. Jurisdiction exists to decide the dispute now.